No. 12512

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA INDUSTRIAL BOARD and ALFRED J. PETERSON,
Appellants,

v.

ALASKA PACKERS ASSOCIATION,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division

BRIEF FOR APPELLEE

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STATEMENT OF FACTS.

As mentioned in the brief for appellants, the facts of this case are not in dispute. Since appelants' brief, however, does not include all the facts which appellee considers relevant, a brief statement follows:

Alfred J. Peterson was employed by the Alaska Pack-

ers Association in the State of Washington on April 28, 1947. He was employed as a deck hand aboard the vessel "BRANT" sailing from Blaine, Washington for the waters of Bristol Bay, Alaska. The exact size of the vessel "BRANT" does not appear in the record, but it was a vessel of sufficient size to make the journey from the State of Washington northward and across the Gulf of Alaska to Bristol Bay. On June 19, 1947, Peterson was transferred from the vessel "BRANT" to the vessel "RAIL", again as a deck hand. The vessel "RAIL" was 44.8 feet in length and had a gross tonnage of 20.84 tons and a net tonnage of 9 tons.

On July 10, 1947, while the "RAIL" was anchored in the navigable waters of the United States, Peterson allegedly injured his back while depositing a sack of coal on the galley floor after having carried it from the bow to the stern of the vessel.

Peterson had no duties to perform ashore and performed no work ashore, his duties being confined entirely to the respective vessels on which he worked. Subsequently, Peterson was admitted to the United States Marine Hospital at Seattle, Washington on August 11, 1947, being discharged on September 11, 1947.

The Alaska Industrial Board concluded that it had jurisdiction and entered a Decision and Award which was subsequently reversed by the United States District Court for the Territory of Alaska, Division Number One, for the reason that this case fell within the realm of exclusive maritime jurisdiction and that the Territorial law was inapplicable.

ARGUMENT

I.

ALFRED J. PETERSON'S ALLEGED INJURY WAS SUSTAINED WHILE HE WAS WORKING AS A SEAMAN IN THE TRADITIONAL SENSE ON THE NAVIGABLE WATERS OF THE UNITED STATES, AND THE FACTS DO NOT FALL INTO ANY EXCEPTION TO THE CONSTITUTIONAL PROVISIONS AND FEDERAL ACTS BY WHICH THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION IN MARITIME MATTERS.

Article Three, Section Two, of the United States Constitution provides that:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The case of *Southern Pacific Company v. Jensen*, 244 U.S. 205, 61 L. Ed. 1086, established the fact that States could not make their workmen's compensation laws apply in admiralty matters, holding that the jurisdiction of the United States was exclusive under Article Three, Section Two of the Constitution. In the Jensen case, a stevedore was killed in unloading a vessel in the harbor of New York and his widow proceeded under the New York Workmen's Compensation Act. The Supreme Court ruled that the State had no jurisdiction.

Subsequently, Congress attempted to delegate to the States the right to make their Workmen's Compensation Acts applicable to persons engaged in maritime employment. These attempts were declared unconstitutional by the Supreme Court in the cases of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 64 L. Ed. 834, and *State of Washington v. W. C. Dawson Co.*, 264 U. S. 219, 68 L. Ed. 646.

Upon the holding that these two acts were unconstitutional, the Federal Government entered this field by the pasage of the Longshoremen's and Harbor Workers' Compensation Act, which applies to all maritime employees other than the masters and members of the crew of vessels, and by passage of the Jones Act, giving members of the crew rights in addition to their traditional remedies in regard to unseaworthiness, maintenance and cure. Since the passage of these Acts, the Supreme Court of the United States has consistently held that where an injured person is a seaman performing a seaman's duties on navigable water, state law is inapplicable.

It is true that the Jensen case has been criticized, yet the principal of law there enunciated has been upheld in the most recent Supreme Court cases. This is especially true since the passage of the Longshoremen's and Harbor Workers' Compensation Act and the Jones Act. Thus, in the case of *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S. Ct. 221, 86 L. Ed. 184, Justice Black, speaking for the Court, stated:

> "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a State may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decison excluded from State compensation laws. Without affirming or rejecting the constitutional implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence."

The Parker case involved an employee of a corporation which sold outboard motors. Although the employee's work was primarily on land, he accompanied another employee in a small boat for the purpose of testing one of the company's motors. He fell from the boat into a river and was drowned. The Supreme Court of the United States held specifically that the State Workmen's Compensation Act was not applicable in the case and that the Longshoremen's and Harbor Workers' Compensation Act did apply.

Similarly, in the case of *Employers' Liability Assurance Corp. c. Cook*, 281 U.S. 237, 50 S. Ct. 308, 74 L. Ed. 823, the entire Court, with the concurrence of liberal Justices Holmes, Brandeis and Stone, ruled that the Texas Workmen's Compensation Act could not apply in the case of an employee injured while in the hold of a vessel assisting in its unloading. This decision was rendered despite the fact that Cook, the employee, normally worked ashore in Texas and was sent on a special assignment to assist in the unloading of the vessel at the time that he was injured. In his concurring opinion in that case, Mr. Justice Stone, stated:

> "As the court, in *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142, 73 L.Ed. 232, 49 Sup. Ct. Rep. 88, 28 N.C.C.A. 18, held that one engaged as a stevedore in unloading a ship lying in navigable waters is a seaman within the meaning of the Jones Act (June 5, 1920), 41 Stat. at L. 1007, chap. 250, U.S.C. Title 46, Sec. 688; *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 71 L.Ed. 157, 47 Sup. Ct. Rep. 19, and that by that Act Congress had occupied the field and excluded all State legislation having application within it, I

> am content to rest this case on that ground.. See *Nogueira v. New York, N.H. & H.R. Co.* decided this day (281 U.S. 128, ante, 754, 50 Sup. Ct. Rep. 303)."

In the case of *Northern Coal and Dock Co. v. Strand*, 278 U.S. 142, 73 L.Ed. 232, Strand was employed as a stevedore and was killed while working on the vessel assisting in its unloading. The Supreme Court, in an opinion in which all the Justices concurred, held that the State Compensation Act was inapplicable. Again, Mr. Justice Stone concurred, as follows:

> "I concur in the result as the majority have placed their conclusions in part, at least, on the grounds that a stevedore while working on a ship in navigable waters is a 'seaman' within the meaning of the Jones Act, (*International Stevedoring Co. v. Haverty*, 272 U.S. 50, 71 L.Ed. 157, 47 Sup. Ct. Rep 19), and that by the Jones Act, Congress has occupied the field and excluded all State legislation having application within it. I am content to rest the case there."

In cases involving employees whose principal duties are ashore and other employees under circumstances where the injury does not occur on navigable waters of the United States, the Supreme Court has found exceptions to the general law excluding the applicability of state compensation statutes. It is expressly to be noted, however, that these exclusions do not apply to cases such as the one at bar, where a seaman is injured in performing maritime duties on the navigable waters of the United States.

As recently as March 1, 1950, this learned Court reiterated the doctrine of *Southern Pacific Company v. Jensen*, supra, in regard to exclusive maritime juris-

diction in its decision in the case of *Alaska Steamship Company v. M. P. Mullaney*, 180 Fed.2d 805, stating:

> "The cases dealing with state legislation extending workmen's compensation laws to seamen (*Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 64 L.Ed. 834; *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 68 L.Ed. 646) expound the general policy, both of the Acts of Congress, and of admiralty law independently of statute, to assure uniformity in this field. We recognize that policy, and if we were dealing with a territorial act creating new rights, or altering old rights, as between seaman and his employer, we would necessarily enforce it."

The exceptions to the exclusive maritime jurisdiction of the United States are brought out in the case of *Davis v. Department of Labor*, 317 U.S. 249, 63 S. Ct. 225, 78 L.Ed. 246, wherein the Supreme Court held that an engineer employed in dismantling a steel bridge connecting two points of the State of Washington, who was injured while on a barge underneath the bridge working on the steel dismantled from the bridge, could recover under the Washington State Compensation Law since its applicability was a matter of purely local concern. It is to be noted that the employee in that case, however, was not a seaman and that his work was not essentially of a maritime nature, although admittedly he was on the barge in navigable water at the time of his injury. The dismantling of a bridge is historically non-maritime work and the fact that the employee continued to work on the steel girders on a barge anchored in the river was not considered as controlling in view of the fact that application of the

State Workmen's Compensation Act would not conflict with the general principles of maritime law. The direct opposite is true in the case of a seaman performing seaman's duties upon navigable water, so that the subject case cannot be held, by any means, to fall within the so-called "twilight zone".

The distinction is well set forth in the recent case of *Gahagan Construction Corp. v. Armao,* 165 F.2d 301, 303, cert. den. 333 U.S. 876. Armao was employed aboard a barge dredging tidelands which were dry a considerable portion of the time. He was injured while so employed, and the question arose as to whether the Massachusetts Workmen's Compensation Act or the Jones Act was applicable. With reference to the "local concern" doctrine, the Court stated:

> *"The only verbal test given in the cases is that if the employment has no direct relation to navigation and commerce, if state regulation will not prejudice the uniformity of the maritime law, then state laws may be applied and the general maritime jurisdiction abrogated. Millers' Indemnity Underwriters v. Braud,* 1926, 270 U.S. 59, 46 S.Ct. 194, 70 L.Ed. 470; *Grant Smitth-Porter Ship Co. v. Rohde,* 1922 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008. No more definite test has been laid down, with resulting confusion in the lower federal courts. The constitutional basis of the Jensen case has been severely questioned, but the idea of an exclusive maritime law not subject to state law has never been repudiated by the Supreme Court. As late as 1941, the Court, in *Parker v. Motor Boat Sales,* 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, stated that regardless of the constitutional basis of the Jensen and later decisions, Congress in the enactment of the Longshoremen's and Harbor Work-

ers' Compensation Act had accepted them as defining the line between admiralty and state power.

" * * * The Supreme Court has indicated that within a shadowy area where it is unclear which law should apply, if either the Longshoremen's Act or a state act is applied, the result will be upheld. See *Davis v. Department of Labor*, supra. But it should be noted that the overlap is between the federal compensation act and the state acts. It has not been suggested that the Jones Act and the state acts overlap. *In no case in the Supreme Court in which the injured person was a seaman performing a seaman's duties on navigable waters has state law been held applicable.* Even those members of the Supreme Court who customarily dissented in the application of the Jensen rule, concurred in holding state acts inapplicable where the injured person wa sa seamon covered by the Jones Act. See *Employers' Liability Assurance Corporation v. Cook, supra*, 281 U.S. at page 237, 50 S.Ct. 308, 74 L.Ed. 823; *Northern Coal & Dock Co. v. Strand, supra*, 278 U.S. at page 147, 49 S.Ct. 88, 73 L.Ed. 232. Summarily stated, their theory was that the Constitution itself did not prohibit state action in the silence of Congress, but after Congress had spoken there could be no state regulation.

" * * * *So we conclude that if the plaintiff was a seaman injured on navigable waters, there is no place for the application of the doctrine of local concern.*" (Emphasis ours.)

II.

THE SUPREME COURT OF THE UNITED STATES HAS DECIDED ALL THE ISSUES INVOLVED IN THIS CASE IN ITS DECISION IN LONDON GUARANTEE & ACCIDENT CO. v. INDUSTRIAL ACCIDENT COMMISSION, HOLDING THAT THE EXCEPTIONS TO THE EXCLUSIVE MARITIME JURISDICTION OF THE UNITED STATES DO NOT APPLY IN THE

CASE OF A SEAMAN INJURED ON THE NAVIGABLE WATERS OF THE UNITED STATES.

In *London Guarantee & Accident Co. v. Industrial Accident Commission*, 279 U.S. 109, 73 L.Ed. 632, the Supreme Court was confronted with a closely analogous situation to the one at bar. In that case, a man named Brooke was employed by the Morris Pleasure Fishing, Incorporated, as a seaman aboard a small pleasure fishing vessel. The vessels operated out of Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, and they were of a size ranging from four to fourteen tons registry. A storm arose and Brooke was ordered to proceed to an anchored vessel which had broken from its moorings approximately three-quarters of a mile to a mile from the pier. The small boat capsized and Brooke was drowned.

It is to be noted that in the London Guarantee case, no element of interstate commerce was involved. The entire transaction and the entire duties of Brooke were within a short radius of the Santa Monica pier. In the case at bar, Peterson was employed in the State of Washington and he worked as a deck hand, sailing from that State through the waters of Canada and Alaska and on the high seas. Brooke was injured while on a small skiff, while Peterson was injured aboard the larger motored vessel. Nevertheless, the Supreme Court of the United States reversed the decision of the Supreme Court of California which had held that the injury fell within the purview of the state workmen's comepnsation act.

In discussing cases involving an exception to the

general rule that the Federal government has exclusive jurisdiction over maritime cases, the Supreme Court used words directly applicable to the Peterson case when it stated:

> "Nothing in these cases could apply to the case before us. They may be said to be of an amphibious character. * * * Here it is without dispute that the deceased was a sailor; that his employment and relation to the owner of the vessel were maritime. * * * There was no feature of the businss and employment that was not purely maritime. To hold that a seaman engaged and injured in an employment purely of admiralty cognizance could be required to change the nature or conditions of his recovery under a state compensation law would certainly be prejudicial to the characteristic features of the general maritime law."

The Court went on to state at page 124:

> "Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica bay, 5 or 10 miles to the deep-sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States . Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, § 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. * * * The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits

> one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features. * * * "

The subject case does involve the uniformity of the general maritime law in interstate and foreign commerce since Peterson was employed in the State of Washington and served as a deck hand at all times after the vessel "BRANT" left the port at Blaine, Washington until his injury in the waters of Alaska. Even if this were not so, however, the provisions of the London Guarantee case would control since to apply a state workmen's compensation act in a case such as this, involving injury to a seaman on the navigable waters of the United States, would be prejudicial to the characteristic features of the maritime law.

III.

THE FACTS OF PETERSON'S EMPLOYMENT DO NOT BRING HIS INJURY WITHIN THE PROVINCE OF THE SO-CALLED "TWILIGHT ZONE" REFERRED TO IN THE CASE OF DAVIS v. DEPARTMENT OF LABOR.

The case of *Davis v. Department of Labor*, 317 U.S. 249, 87 L.Ed. 246, holds that in certain borderline cases between Federal and State jurisdiction, the Courts will give great weight to the presumption of the constitutionality of the State Act, as well as the

conclusions of the appropriate Federal authorities. The Court stated:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. * * * "

An examination of cases holding that state compensation acts may validly be applied reveals that in all such cases certain minimum factors must appear. Those factors are as follows: either the injury must have occurred on land or the employment must be predominantly shore work or non-maritime; and the application of the local law must not work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations. All cases coming within these categories may more readily be contrasted with the one here involved than compared with it.

In the case of *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 66 L.Ed. 321, a carpenter was injured while working on an unfinished vessel moored in a river. Since the work aboard the unfinished vessel was a non-maritime contract and since Rohde's general employment had nothing to do with navigation, it was held to be a matter of local concern.

In *Millers' Indemnity Underwriters v. Braud*, 270 U.S. 59, 70 L.Ed. 470, a diver was working 35 feet from the bank of a river on the bottom of the river sawing off timbers from an old abandoned ways when he died of suffocation. The case did not involve a sea-

man and the general maritime laws were not involved.

Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467, 72 L.Ed. 656, involved a fisherman seaman who had general work to do around a cannery. He was injured after the fishing season while standing on the shore and endeavoring to push a stranded fishing boat into the water. In addition to the fact that the injury occurred on land, it is obvious that the employee's work was of an amphibious nature.

The case of *Sultan Ry. & Timber Co. v. Department of Labor & Industries*, 277 U.S. 135, 72 L.Ed. 820, concerned an employee engaged in assembling saw logs for booms. He was not employed aboard a vessel, and if his employment had any relation to admiralty features, it was only incidental to navigation.

State Industrial Commission v. Nordenholt Corp., 259 U.S. 263, 66 L.Ed. 933, involved an employee injured while on a dock which, under maritime law is regarded as an extension of land, so that the injury could not be regarded as occurring on the navigable waters of the United States.

T. Smith & Son v. Taylor, 276 U.S. 179, 72 L.Ed. 228, involved the same principles as the Nordenholt case, since a longshoreman was struck by a sling while working on a stage resting solely upon a wharf. He was knocked into the water, but since the injury occurred on a projection of land, the state law applied.

In *Ex Parte Rosengrant*, 213 Ala. 202, 104 So. 409, aff'm'd 273 U.S. 664, 71 L. Ed. 829, it was held that a lumber mill employee whose duties were those of checking and grading lumber in the lumber yard, on

railroad cars and also on barges could receive compensation under a state Act when injured while standing on a schooner checking lumber on a barge between the schooner and the dock. The employee did not handle the lumber, and, of course, his work had no direct relation to navigation and was not under a maritime contract.

The case of *U. S. Casualty Co. v. Taylor*, 64 F.2d 521, cert. den. 290 U.S. 639, 78 L.Ed. 555, involved essentially the same situation as the Rohde case, since the employee was working on an unfinished vessel and therefore was engaged in non-maritime employment.

Vancouver SS Co. v. Rice, 288 U.S. 445, 77 L.Ed. 885, again involved an injury occurring on a dock, an extension of land. A similar situation was that of the recent case of *Toups v. Maryland Casualty Co.*, 172 F.2d 542, cer. den. 336 U.S. 967, 98 L.Ed. 1119, where a pilot working on a dock fell into the water. Since the injury occurred on land (the dock being regarded in maritime law as an extension of land), the state Act was applicable.

The case of *Davis v. Dept. of Labor*, supra, involved a structural steel worker engaged in dismantling a drawbridge across a river in the State of Washington. He was standing on a barge beneath the bridge working on the steel dismantled from the bridge when he was injured. The employee was not a seaman, his work was not essentially of a maritime nature since the dismantling of a bridge is historically non-maritime work, and the case falls within the class of cases involving amphibious employment.

Moore's Case, 80 N.E.2d 478, cert. den. 335 U.S. 874, 93 L.Ed. 417, concerned a rigger, generally employed ashore, temporarily working on a boat in drydock. The drydock was fastened to a dock by bolts. Thus the employment was amphibious in nature and it may also be argued that the drydock, being fastened to the dock, was an extension of land, for both of which reasons the case may be regarded as falling wthin the so-called "twilight zone".

The case of *Baskin v. Industrial Accident Commission*, 201 P.2d 549, reversed 338 U.S. 854, 94 L.Ed. 62, is closely analogous, since it involved an employee, generally employed ashore, working aboard a ship at dock, who was injured while carrying planks from one hold of the ship to another. The amphibious nature of the employment brought the case within the "twilight zone" together with the fact that none of the general characteristics of maritime etmployment were involved.

It thus may be seen that analysis of Supreme Court decisions holding that state acts may apply reveals that in no such case has the Supreme Court held that a seaman, in the traditional sense, engaged in maritime work on navigable waters, may seek recourse under a state compensation act in addition to his remedies under the Jones Act and those for unseaworthiness, maintenance and cure. The decison in the case of *London Guarantee & Accident Co. v. Industrial Accident Commission* has in no way been overruled or altered by succeeding cases in the Supreme Court of the United States, and it is respectfully submitted that

that decision must be regarded as the law in the case at bar.

In addition to a few of the cases described above, apellants refer to the New York case of *Elridge v. Weidler*, 81 NYS 2nd 58, Brief for Appellants, Page 10. That case is readily distinguishable from the case at bar since it involved an employee whose work was entirely performed ashore. On an isolated occasion he was asked by his employer to take a rowboat and proceed to a waiting ship some distance off shore. He was drowned in following out these instructions. Obviously his employment was predominantly ashore and had nothing to do with the general maritime laws.

The distinction between the Eldridge case and the case at bar requires no amplification, but the decision of the Supreme Court of New Jersey in *Hardt v. Cunningham*, 54 Atlantic 2nd 782, further emphasizes the distinction between amphibious employment such as that of the Eldridge case and maritime employment such as that involved in the subject case. Hardt was the skipper of a barge which was tied up at a New Jersey dock while he went ashore to get certain supplies. He returned to the vessel and proceeded to jump aboard. Aftr landing on the deck of the vessel, he lost his balance, fell into the water and was drowned. Proceeding was instituted under the New Jersey State Workmen's Compensation Law. The Court held:

> "As we have seen, jurisdiction in admiralty over torts and injuries of this class depends upon the locality of the injury; and, after all, the ultimate and basic test is whether the injury occurred on the land or on navigable water. Did the sub-

stance of the injury originate on the land or on navigable water in the sense that its consummation somewhere was inevitable? Here, the substance and consummation of the wrong or injury took place on navigable water and not on the land. The decedent 'landed' in an upright position upon the barge after he 'jumped' from the dock. Whether the loss of equilibrium was due to the movement of the vessel upon the water, or from another cause, we have no way of knowing; but, whatever the reason, the mishap was in essence an occurrence upon the water remediable under the maritime law only. There was not, in the 'jump' from the dock to the vessel, the commencement on the land of inevitable injury. The drowning of the decedent was not the result of an accident upon the land, but rather the consequence of his fall from the vessel; and this was just as much a mishap upon the water as if the fall had occurred while the decedent, in boarding the barge, was using a ladder provided for the purpose—even more so, for the fatal fall was from th vessel itself."

The Court goes on to discuss the applicability of the case of *Davis v. Department of Labor* (supra), as follows:

"While this is a borderline case, it is not referable to the marginal area arising from the blending of Federal and State jurisdictions where the individual case suggests characteristics of both and so does not lend itself to absolute classification, and the doctrine of *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, has no pertinency. There, the employee was a structural steel worker whose employer was subject to the State Compensation Act, but who at the same time was engaged in the performance of a contract for the dismantling of an abandoned drawbridge which spanned a navigable river—essentially a land structure. The workman was

> employed to aid in the cutting of the steel, both on the bridge itself and in the barge underneath to which the cut steel had been removed for towage to a storage point. The activity was in the main of a local rather than a maritime nature. Compare *Martin v. West*, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed. 159, 36 L.R.A., N.S., 592; *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008; *Ford v. Parker*, supra; *DeGraw v. Todd Shipyards Co.*, 134 N.J.L. 315, 47 A.2d 338. And in the Davis case, the State Compensation Act, unlike our own, applied to 'all employees and workmen . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws.' Rem. Rev. Stat. Wash. Sec. 769a. The general presumption of constitutionality in favor of the State statute was invoked to sustain the State acion in a case involving 'doubtful and difficult factual questions'."

As in the Hardt case the subject case involves a maritime contract since Peterson was a member of the crew of a seagoing vessel and had no duties to perform ashore. There is no question in the Peterson case but that the alleged injury occurred while Peterson was about his duties as a seaman aboard the ship in the navigable waters of the United States so that the Peterson case falls within the often expressed rule that Fedral law is exclusive in the realm of maritime jurisdiction.

Southern Pacific Co. v. Jensen, supra;
Knickerbocker Ice Co. v. Stewart, supra;
State of Washington v. W. C. Dawson & Co., supra;
Clyde SS Co. v. Walker, 244 U.S. 255, 61 L.Ed. 1116;
Northern Coal & Dock Co. v. Strand, supra;
Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479, 67 L.Ed. 756;

Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171, 69 L.Ed. 228;
Messel v. Foundation Co., 274 U.S. 427, 71 L. Ed. 1135;
London Guarantee & Accident Co. v. Industrial Accident Comm., supra;
John Baizley Iron Works et al v. Span, 281 U. S. 222, 74 L.Ed. 822;
Employers' Liability Assurance Corp. v. Cook, supra;
Nogueria v. N.Y., N.H. & H.R. Ry. Co., 281 U.S. 128, 74 L.Ed. 754;
Minnie v. Port Huron Terminal Co., 295 U.S. 647, 79 L.Ed. 1631;
Parker v. Motor Boat Sales, supra;
Gahagan Construction Corp. v. Armao, supra.

IV.

CASES DECIDED BY THIS HONORABLE COURT INVOLVING THE SAME LOCALE AS THAT INVOLVED IN THE PETERSON CASE INDICATE THAT THE SUBJECT CASE COMES WITHIN THE REALM OF EXCLUSIVE MARITIME JURISDICTION.

There are two comparatively recent Alaska cases which are similar to the one at bar, one of which in particular appears to be directly in point. The first of the two cases is that of *Alaska Packers Association v. Marshall*, 95 F.2d 279. In that case, "the employees were to work on shore, not only in conditioning their schooners, mending nets and other fishing paraphernalia, but also in the canneries and salteries". The men so employed also, for a short time during their summer's employment, went out for a distance of two or three miles from the cannery at Bristol Bay in small boats for the purpose of fishing for the cannery. Such

a boat overturned, and two employees were drowned. Judge Denman, speaking for the Court, stated:

> "When the details of the contract of employment are considered, the local character of this gathering of the cannery's raw material is clearly seen as a mere incident in the canning process.",

and the Court concluded by holding that the California Compensation Law was applicable since the contract of employment was made in that State. Since, in that case, the fishermen were employed as regular cannery workers in a cannery located in Alaska, and since they had no duties to perform in going to or from Alaska, there is an adequate basis for the Court's decision. The decision, however, is expressly limited to its exact factual situation by the later case of *Olsen v. Alaska Packers Association*, 114 F.2d 364, which case is on all fours with the case at bar. A sailor was injured in loading frozen beef aboard a vessel from another vessel. The case was stronger on its face than the case at bar in that Olsen apparently performed shore work as well as the work of a sailor. In holding that the matter was one exclusively for maritime jurisdiction, the Court stated:

> "The fact that the work which libelant was 'to participate in' was to be in canning operations does not negative the fact that at the later time when he was injured he was employed in other work than in canning.",

and it further stated:

> "We are not disposed to press the exclusion of the maritime jurisdiction beyond the area of *Alaska Packers Association v. Marshall*, 9 Cir., 95 F.2d 279, and hold that the libel is within the admiralty and maritime jurisdiction and that

> the District Court should proceed with the case as in admiralty."

The fact that the vessel on which Olsen was employed happened to be 35 miles away from its dock at the time that he was injured rather than in navigable water along side the dock, as in the present case, is totally immaterial. No cases distinguish as to maritime jurisdiction on the basis of the distance of the vessel from shore. It is to be noted that in the case of *Gahagan Construction Co. v. Armao*, supra, the barge on which Armao was working was actually out of the water a good portion of the time, and yet the Supreme Court affirmed the decision holding that it was a matter for exclusive maritime jurisdiction. The essential requirement is that the injury occur on navigable water.

The Marshal case may, in a sense, be said to have anticipated the Davis case. Marshal's employment could be regarded as falling within the "twilight zone" since his duties were largely concerned with shore work in the cannery. The Olsen case, holding that the seaman's injury fell within the exclusive realm of maritime jurisdiction, must be regarded as stating the law under the stronger factual situation here involved, since it appeared that Olsen had duties to perform ashore.

Peterson had no duties to perform ashore and performed no duties ashore. He worked as a deck hand aboard a seagoing vessel sailing the ocean from Blaine, Washington, through the waters of Canada, on the high seas and in the waters of Alaska. He was a seaman

in the traditional sense, and entitled to all the rights and recourses historically granted to seamen, as well as those extended to such employees by the Jones Act.

This case is not one involving a hardship to the employee where justice might require a Court to make an exception to established precedents. Peterson is entitled to maintenance and cure, and in addition, if he feels his injury is a result of negligence of his employer, he may take action under the Jones Act. In that connection, it is significant to note that Peterson took advantage of the right that seamen have to be admitted to U. S. Marine Hospitals.

Being a member of the crew entitled to all of the privileges of a seaman, he cannot, in addition, require his employer to be subject to various state workmen's compensation acts.

CONCLUSION

To hold that this is not a case for exclusive maritime jurisdiction would be to make meaningless the provisions of Article 3, Section 2 of the U. S. Constitution; to disregard the intention of Congress in prescribing remedies for seamen, as expressed in the Jones Act; and to do away with the uniformity, so essential in maritime matters. Had Peterson been injured in the waters of the State of Washington, the Washington State compensation act would more logically apply than the Alaska act under the present circumstances, since Peterson was a resident of the State of Washington and was employed there. He would have a

different set of remedies under appellants' theory if he were injured in the waters of Canada, and still a different remedy must be assumed to be applicable if he were injured on the high seas. Such a decision would be in complete disregard of the very factors which those preparing the Constitution of the United States, the Congress and the Supreme Court have deemed so advisable.

It is accordingly respectfully submitted that the judgment of the District Court for the Territory of Alaska, Division Number One, reversing the decision of the Alaska Industrial Board and holding that this case falls within the realm of maritime jurisdiction, be affirmed.

Dated at Juneau, Alaska, this 29th day of August, 1950.

Respectfully,

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